

DEPARTMENT OF JUSTICE

SUPREME COURT OF THE UNITED STATES

APPEAL FROM THE

U. S. DISTRICT COURT

JOHN P. SWANSON, PLAINTIFF IN ERROR,

THE UNITED STATES OF AMERICA,

DEFENDANT IN ERROR.

(30,601)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 636

JOHN F. STEELE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

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[fol. 1] **THE UNITED STATES OF AMERICA, ss:**

WRIT OF ERROR—Filed April 8, 1924

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court of the United States for the Southern District of New York, before you, between the United States of America, Plaintiff, and John F. Steele, Defendant, a manifest error has happened, to the great prejudice and damage of the said John F. Steele, as by his complaint appears, we being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington on the 30th day of April, next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Hon. William H. Taft, Chief Justice of the United States, the 8th day of April, 1924, and of the independence of the United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk of the District Court, Southern District of New York. (Seal of District Court of the United States, Southern District of N. Y.)

Allowed by Edwin L. Garvin, United States District Judge.

[fol. 2] **IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, OF THE OCTOBER TERM, IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND TWENTY-THREE**

INFORMATION

Now comes William Hayward, United States Attorney for the Southern District of New York leave having been first had and obtained and respectfully informs the Court that heretofore to wit, on the 6th day of December, one thousand nine hundred and twenty-three, in the Southern District of New York and within the jurisdiction of this Court, John Steel unlawfully, wilfully and knowingly

did possess in garage at 611 West 46th Street, New York City a quantity of intoxicating liquor to wit 150 cases whiskey, 92 bags, whiskey, 1 five gal. can alcohol, 6 five gal. jugs whiskey, 33 cases gin, 102 quarts whiskey, 2 fifty gal. bbls. whiskey, which then and there contained more than one half of one per cent of alcohol by volume, and which then and there was fit for use for beverage purposes against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Title 11, Act of October 28, 1919.)

William Hayward, United States Attorney.

[fol. 3] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,

against

JOHN F. STEELE, Defendant

Bill of Exceptions

Be it remembered that the above entitled cause came on for trial on the 12th day of March, 1924, being one of the days of the March Term of said Court, before the Hon. Edwin L. Garvin, one of the Judges of said Court and a jury duly impanelled.

David Siegel appeared as counsel for the Government.

Meyer Kraushaar appeared as counsel for the defendant.

COLLOQUY BETWEEN COURT AND COUNSEL

Before the jury was impanelled, Mr. Kraushaar addressed the Court as follows, and to which the Court made the following rulings:

Mr. Kraushaar: At the outset I should like to place upon the record before the jury is drawn that the trial of the action be stayed, upon the appeal from the order of this Court declining to quash the search warrant upon which the evidence was secured and upon which the prosecution is based. I take it that if the United States Supreme Court should reverse the search warrant, this proceeding must necessarily fall.

The Court: Motion denied. The point as suggested by counsel may be included by the defendant in his points for reversal on appeal and assignment of error in the event of conviction, and any wrong which the District Court may do, or any error which may be committed, if error, can be corrected by the Circuit Court of [fol. 4] Appeals upon review of any conviction.

Mr. Kraushaar: This case will of necessity involve a constitutional question and go direct to the Supreme Court. I am going to

raise that question. As soon as the prosecution has opened the case to the jury I am going to renew my application to quash the search warrant and suppress the evidence and raise any additional point which I did not raise before the United States Commissioner or before the District Court in the prior case and perhaps that may change your Honor's ruling.

The Court: I will hear it and give careful attention to it.

(Mr. Siegel, on behalf of the Government, opened to the jury.)

Mr. Kraushaar: I desire to avail myself of the opportunity at this time of presenting the defendant's case to the jury. It isn't usual in these courts, but I should like to do it.

The Court: That will be permitted.

(Defendant's counsel opens to the jury.)

The Court: Please confine yourself to what you expect to prove.

Mr. Kraushaar: Yes, your Honor, but I think in order to present that intelligently to this jury it is necessary, by way of introduction, to call their attention to these constitutional provisions of which we must all take judicial notice and be obedient.

Mr. Siegel: If the Court please, I do not see how the question of the legality of the search warrant could possibly be one of fact.

The Court: It cannot be, but Mr. Kraushaar says he cannot explain to the jury the facts without these preliminary statements, and the Court feels it should not interfere as to a statement of that kind by counsel.

The Government to maintain its case offered the following evidence, to wit:

MOE SMITH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

[fol. 5] Direct examination by Mr. Siegel:

Mr. Kraushaar: If your Honor please, I take it that the District Attorney will concede that the evidence according to his opening, upon which this information is entirely based, was secured under a search warrant which was issued by the Honorable Samuel Hitchcock, United States Commissioner, in December, 1922. I think the orderly procedure would be if I at this time offer that search warrant in evidence and the affidavit upon which it is based and make my motion at length to vacate it.

The Court: Has not that motion been made and denied by Judge Winslow?

Mr. Kraushaar: Even if it has, your Honor may not be willing to follow Judge Winslow's decision on that point, and on the further ground, the point I want to raise now has never been raised before Judge Winslow.

The Court: Please confine yourself to any new points which have not heretofore been presented to the Court. I do not think the

orderly procedure would warrant a judge sitting in a district to vacate an order upon the same facts presented to a second District Judge. Present your new points but I shall not hear argument upon them.

Mr. Kraushaar: I desire to offer this search warrant and affidavit in evidence.

The Court: Received.

(Marked Defendant's Exhibit A.)

Mr. Kraushaar: Your Honor, I move to suppress the evidence about to be given by the witnesses for the prosecution and to vacate the search warrant upon the ground that the constitutional rights of this defendant have been invaded because the warrant issued by the United States Commissioner was issued in violation of the fourth amendment to the Constitution of the United States, in that the same was not issued upon probable cause supported by oath or affirmation, particularly describing the place to be searched or the person or things to be seized; second, because the search and seizure conducted under the warrant aforesaid was unreasonable; third, because the warrant was issued in violation of Article 5 of the amendments to the Constitution of the United States, in that the same deprives the claimant of his property without due process of law, and on the further ground that by virtue thereof defendant was [fol. 6] compelled to be a witness against himself in a criminal proceeding. Fourth, because the said warrant was based upon conjecture, surmise and suspicion, and not upon reasonable or probable cause of a violation of the aforesaid provisions of the Constitution; that search warrant limited the officer to whom it was directed to search the garage in the premises 611 West 46th Street in the Borough of Manhattan, City and Southern District of New York, and the officer in making the search in violation of the Constitutional guarantee, searched other and different premises, to wit, the premises 609 West 46th Street, in the Borough of Manhattan, City and Southern District of New York; on the further ground that the affidavit upon which this search warrant was based shows that the only place upon which the liquor was first seen or anything resembling the nature of liquor or anything upon which probable cause may be based, that there was liquor, was in the garage 611 West 46th Street, and the search warrant permitted the search of not only the garage but of any safe, desk, store room, receptacle, basement or a sub-cellar, building, room or rooms used in connection with such garage, without any proof either by oath or affirmation, of Isidor Einstein or any other person that there was -ny safe or desk, room, container, receptacle, basement, sub-cellar, building, room or rooms used in connection with such garage, that there was any proof in this affidavit that there was any liquor, or any reasonable cause to believe there was any liquor in any safe or desk, store-room, container, receptacle, basement or sub-cellar, building, room or rooms used in connection with said garage.

Now I wish to raise the point that has never been raised, either directly or indirectly before Judge Winslow or before the United States Commissioner in my application to vacate the search warrant. It had been held in a recent case, the case of United States against Musgrave, 293 Federal 202, Judge Woodruff, and I think the reasoning in that case is sound, logical and clear, and I cannot see how any one can get away from it—that a search warrant can only be executed by an officer of the United States and can only be issued to an officer of the United States and that a prohibition agent is not an officer of the United States as held by a numerous line of decisions. This search warrant is directed to Isidor Einstein, general prohibition agent, who obviously is not an officer of the United States, and therefore the warrant was void, there was no right to make the seizure and search, the warrant having been issued to an unauthorized person.

[fol. 7] There is another consideration I wish to point out for the record, even assuming that Judge Ervine correctly states the law. This search warrant is insufficient and was illegally obtained because in the affidavit upon which it was issued Isidor Einstein simply swears he is a general prohibition agent. The Federal Court could not take any judicial notice of the meaning of the term general prohibition agent. In the first place, the statute does not authorize the appointment of any such—

The Court: He need not have had anything to do with the Government whatever, as far as official capacity is concerned. The Commissioner must have proof before him and provided it is competent proof—

Mr. Kraushaar: The warrant expressly states that the only proof upon which the Commissioner acted is the affidavit of Isidor Einstein.

The Court: I think his position as Federal Prohibition Agent, or whatever position he might have had is absolutely immaterial so long as he is an individual.

Mr. Kraushaar: The law does not recognize any such official as a general prohibition agent. The power of enforcement of the National Prohibition Act is vested in the Commissioner of Internal Revenue as I understand it and agents and employes appointed by him. There isn't any such office as a general prohibition agent. Now it may well be that Isidor Einstein was appointed by the Commissioner of Internal Revenue as his agent, but his affidavit does not state that he was so appointed. He submits no proof except he says I am a general prohibition agent, whatever that may mean. Legally it means nothing in my judgment. To put him in a position according to Judge Ervine that internal revenue agents may execute and swear out search warrants, seems to me perfectly clear that before a search warrant can be obtained, the person applying must qualify himself and prove that he has some official standing and that he was duly appointed by the Commissioner of Internal Revenue. There is no such thing in this affidavit at all. Mr. Einstein simply says I am a general prohibition agent. While the

Commissioner may have known of Einstein's official capacity, he had no right to issue this search warrant unless Einstein was ready to swear at the time this affidavit was obtained that he held an appointment from the Commissioner of Internal Revenue or by his duly authorized agent, the Prohibition Commissioner.

The Court: The Commissioner has a right to issue a search warrant upon proof being submitted to him of a violation of law. Each motion is denied with an exception to the defendant. Proceed with the proof.

Mr. Kraushaar: Exception.

By Mr. Siegel:

Q. Mr. Smith, are you an agent of the Treasury Department of the United States?

A. I am.

Q. And how long have you been in the service?

A. January 26, 1920.

Q. Did you go to the premises 611 West 46th Street on December 6, 1923?

Mr. Kraushaar: At this time may I interrogate the witness preliminary to further questions to show that Mr. Smith did not examine these premises or enter these premises before the search warrant was obtained?

Mr. Siegel: All that defendant's counsel could do he has already done.

The Court: Make your request.

Mr. Kraushaar: I ask your Honor at this stage to examine the witness for the purpose of showing that the witness had no evidence of any kind against these premises until the search warrant was obtained.

The Court: Motion denied.

Mr. Kraushaar: Exception.

The Court: December 6th what year?

The Witness: 1922.

Q. 1922?

A. Yes, sir.

I went to premises 611 West 46th Street accompanied by Agent Einstein. The building is a brick building which covers the premises 611 and 609 West 46th Street. I believe it is a four-story brick building having two entrances, garage entrances—big doors leading to this interior on the ground floor, one open space. I should judge the front is about 60 by 50—something like that. I didn't measure it exactly but it was all open. Nothing in the center to support any one of these two doors. There was just one open loft, and that extended clear through from all of 609 and 611 West 46th Street. Agent Einstein was with me. We entered the premises together. Agent Einstein served the search warrant on the man that was in [fol. 9] the interior by the name of Smith. We asked him what his

business was. He said he was the watchman. We told him we were Government Agents and after he had inquired if we had a search warrant we told him we had and were going to search the premises. We looked on the main floor and found nothing. We then asked him to take us up to the first floor in the elevator. We entered the first floor and after getting off we turned to our right about eight or ten feet. I observed a partition about 14 or 16 feet high and the dimensions of the room were about 10 by 20. I observed a light coming through the premises, the top of this partition. I went to the door of this room and I knocked. Somebody from the inside had opened it and there I found three men bottling what I found later to be whiskey from bottles and different containers. I also found in this room corking machines and different hose and pipes, funnels and an assortment such as would be found in a place of that character.

I then asked these men what they were doing there. They said they were working, I asked them who they were working for. They said they were working for a man named John Steel.

Mr. Kraushaar: I object to this and move to strike it out.

The Court: Objection sustained. Strike it out.

The Witness: I placed these men under arrest for violation of the National Prohibition Law.

Mr. Kraushaar: I move to strike that out.

The Court: Motion granted.

After my conversation with these men I left Agent Einstein in charge and went outside and called up the police station, and asked for a few police officers.

Mr. Kraushaar: I move to strike that out.

The Court: Motion granted.

After my telephone call I went to the front of the building on the 609 side and there found a room that was locked. Smith opened this room for us.

Mr. Kraushaar: Do you mean Steel or Smith.

The Witness: Smith.

Mr. Kraushaar: In the presence of the deff.

Witness: No he was not there.

Smith opened this door and we found 33 cases. From that floor we went to the floor above and there found another room. In this room we found 150 cases of whiskey and 92 bags of whiskey. After being in that building about half an hour the defendant John Steel came to the building and he said, "Good morning, officers," I said, "Who are you?" He said, "My name is John Steel. This is my place." I asked him whether he owned the building. He said no. He said that he had a lease on the entire building from top to bottom. He told me his rental. I believe, was \$780 or something to that effect. If you will permit me, I will look at the

record. He said his rental was \$780.33 a month; that he had a lease from 1920 to 1928; also told me that his bank account was at the Chelsea National Bank, 14th Street Branch, and that he had about \$400 on hand. He said he had the garage and storehouse there for a period of eight years. He told me it was the first time that he handled any liquor; that he was only in the liquor game a short while and he was taking as chance; that he had these three defendants whom we had arrested working for him, by the name of Michael Clark, George Kohler and James Leon. We then placed the defendant under arrest and took him to the 47th Street police station and seized the goods and took it to the Knickerbocker Warehouse. We took one bottle for a sample and Agent Einstein delivered it to the United States Chemist in this building. This is the bottle he took for a sample and I sealed it.

Mr. Siegel: I offer that for identification.

(Marked Government's Exhibit 1 for identification.)

[fol. 10] Cross-examination by Mr. Kraushaar:

I never entered the premises before the search warrant was obtained. This papers, Government's Exhibit A, is the search warrant under which Isidor Einstein and I acted. That was the only one we had. It was in possession of Agent Einstein when we entered the premises. This is a copy of the return of the goods seized which we gave to John Steel. I made the pencil memorandum and Agent Einstein signed it. That was the inventory or return which we made.

Mr. Kraushaar: I offer that in evidence.

The Court: Received.

(Marked Defendant's Exhibit B.)

The Witness: This was the only affidavit upon which the search warrant was obtained. I didn't appear before the United States Commissioner when this search warrant was issued. I stayed at 46th Street and Eleventh Avenue, I believe it was, while Agent Einstein came to this building and secured a search warrant. I had no authority other than the search warrant to personally enter these premises. I had never been inside of the premises before the search warrant was obtained. I never saw how this building was constructed. I did not know what was contained on the first floor. I did not know what was on the second floor, nor on any other floors of the building. I said the lower part of the building was used as a garage, and the only way I knew that was because I saw automobiles in there being fixed and some men working on the same. Before I entered the building I did not know whether there was any room, store room, container, receptacle, basement or sub-cellar, building, room or rooms connected or used in connection with the garage.

Mr. Siegel: At this time I must register an objection to the continuation of such questioning.

The Court: I am endeavoring to allow this in order to satisfy Mr. Kraushaar that he has a full basis for any review if he should have to take a review. I think myself it is unnecessarily full, but where counsel urge it so earnestly as counsel does here, his desire to have this record in such shape that the questions may be presented, if necessary, to a reviewing court, I think there should be a great latitude in preparing the record.

Q. Now what time of the day did you go there?

Mr. Siegel: May I ask what date this is?

Mr. Kraushaar: I am talking about the 6th of December, 1922.

A. I should judge around eight something.

[fol. 11] Mr. Siegel: Will your Honor permit this line of questioning? It is wholly irrelevant and incompetent.

The Court: This is cross examination as to the witness' credibility. He may be asked that.

The Witness: I should judge it was around eight, eight-fifteen, early in the morning I know we got there. I don't know how long it took Agent Einstein to come down here, but I believe he got the search warrant some time in the morning before eleven o'clock. To my best recollection I believe somewhere around 9.15 or 9.20 when he left 46th Street to come down for the search warrant.

Q. So that you were only there altogether about three quarters of an hour?

A. Something like that I guess. I didn't time myself at all. We cannot be accurate with it and I won't testify to the exact moment we got there or when we left. When I arrived there Einstein left me at the corner and went down the street. I stayed up on the other side of Eleventh Avenue. I believe it was Eleventh Avenue, the street between which this garage is that was searched, Eleventh and Twelfth or Twelfth and Thirteenth—I don't know just which avenues it covered, but I stayed on the east side and Agent Einstein went down towards the garage and planted himself I should judge about thirty or forty feet from the garage. I don't know just what transpired at the garage while he was there, but I observed the truck going into that garage. I did observe the truck. It was a covered truck and I did not observe the contents of the truck. I did not know what it contained. I did not observe the truck again after Einstein went down to the Commissioner's office. I had left that corner and went down towards 45th Street and made an appointment with Agent Einstein to meet me back at 45th Street. I don't know whether that truck remained in the garage or left the garage. I never saw the truck again when I entered the garage. The first time I entered the garage the truck was not there. When I entered the premises on this search warrant I didn't see that wagon.

Q. Did you see any cases in that garage marked whiskey?

A. An empty case on the elevator marked whiskey.

Q. Was that in the garage or in the elevator?

A. It was in the garage proper. The elevator leads from the garage floor. I said that the case was empty when I saw it in the garage. There was nothing inside the case at all. The place I found the liquor in was the upper part of the building, above the street floor. In one part of the building there was supposed to be a dwelling.

Q. Wasn't there a dwelling?

A. Well, I wouldn't live in it. Smith said he lived there. I saw something that looked like a bed; it was a cot or something. I saw [fol. 12] Mrs. Smith there, in terrible shape. I saw a stove and some part of household effects, frying pans and stuff like that.

Mr. Kraushaar: Now, if your Honor please, I move to strike out and suppress the testimony of Agent Smith on the ground that there is no proof shown that Agent Smith had the right to enter these premises. This search warrant is only directed to Isidore Einstein and affords no right to anybody whatever to enter these premises.

By the Court: How near the cot and stove which you say Smith stated to you was his, was this liquor that you found, how many feet away?

A. There is a room that stands directly in back of a partitioned-off room, back of and adjoining what they call a residence.

Q. And the liquor was found in a room partitioned off?

A. Entirely partitioned off.

The Court: Motion denied.

Mr. Kraushaar: Exception.

By Mr. Siegel:

Q. How large was this elevator?

A. Long enough for an automobile to be taken up on it—I should judge about twenty by thirty or something like that. The elevator runs up to the top of the building.

ISIDORE EINSTEIN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Siegel:

I am employed by the Treasury Department of the United States. I have been so employed since the National Prohibition Act went into effect, since 1920. I obtained a search warrant from Commissioner Hitchcock to go to premises 611 West 46th Street, New York City. On December 6, 1922, I went to said premises accompanied by Agent Smith. We first went to the premises 611 to watch the premises. We had been there for a little while when I saw a truck going—

Q. I don't mean that; when you got the search warrant and you went to the premises 611 West 46th Street, what happened then?

A. Agent Smith and I went in there on the day in question and we met a man and I asked him who he was. I had a conversation with this man. I know his name. His name is Smith.

Q. And after you spoke to him where did you go?

A. I went through the building, I served the paper on him.

Mr. Kraushaar: I object to it on the ground it is incompetent, immaterial and irrelevant.

[fol. 13] The Court: Overruled.

Mr. Kraushaar: Exception.

Witness: Mr. Smith accompanied me over the building.

The Court: What paper did you serve on Smith?

Witness: A copy of the search warrant issued by United States Commissioner Hitchcock. This is the search warrant offered in evidence. On the first floor we found 33 cases of gin and 102 quarts of whiskey and one corking machine and six—five gallon jugs of whiskey and one five-gallon can of alcohol. On the second floor we found 150 cases of whiskey, 92 bags of whiskey, each containing six quarts. Of that one quart was taken off and delivered to the United States Chemist by me in this building. I had a conversation with Steel. I placed Steel under arrest and I walked with him to the 47th Street station house from the garage in West 46th Street. On the way to the station house he asked me whether I can do anything for him. I told him the best thing for him to do is to go to the District Attorney and tell him his troubles. He then told me also on the way down to the station house that this would be a great loss to him if he loses that stuff. He told me where he lived. He said I don't remember the exact number—somewheres in 34th Street he told me at that time. I had a conversation with him. I asked him about those three men, Michael Clark, George Kohler and James Leon. I asked him who those fellows were. He told me those three fellows worked for him. They had nothing to do with the business. The next day, however, we arrested all of them and brought them here. On the day I was there I noticed these three men filling up bottles, corking and labeling them, the three of them. Each one was doing different things. The bottle you show me marked for identification Exhibit 1, I found that bottle of liquor on premises 611 West 46th Street. I sealed it and turned it over to Mr. Quillan, the chemist the next day. I don't remember the exact size of the elevator in that building, but I think it was large enough for an automobile to go up on. The elevator ran from the ground floor up to the top of the building. I asked Steel who Smith was. He told me that Smith is a watchman at his garage, he worked there, and Smith told me the same. I had a talk with Smith about owning this liquor. On the way to the station house I asked him whether he owns the liquor in the place. He told me he did. The inventory on Exhibit B is the inventory for the receipt of which I signed. These are the liquors received and my signature appears on the return, on the copy of the search warrant. There was nothing said by Steel throughout by conversation at any time while I was there or

while I took him to the station house that these premises were used by him as a dwelling.

Q. Was any such thing told you by any of the men that you met [fol. 14] in such premises?

Mr. Kraushaar: I object to this line of testimony on the ground it does not appear that the defendant was warned of his constitutional rights, and that anything he might say might be used against him. The testimony is therefore incompetent, immaterial and irrelevant.

The Court: Objection overruled.

Mr. Kraushaar: Exception.

Cross-examination by Mr. Kraushaar:

Before I obtained the search warrant, Defendant's Exhibit A, I had never entered the premises 611 West 46th Street. I knew what kind of a building it was. I gathered my information which would lead me to believe or tell me what kind of building it was by standing directly across the street where I could see it. I mean I looked from the street into the building. I was standing on the sidewalk and could look through. The door was wide open. I don't know how wide 46th Street is. I mean to tell this jury that I haven't any idea of the width of 46th Street.

Q. Will you point out please to the jury with relation to this room what you conceive to be the width of the street; was it as wide as this room?

A. I am not able to state the exact measurements of the street. I have no approximate idea of the width of 46th Street.

Q. Can't you tell the jury with relation to this room what, in your opinion, would be the width of 46th Street?

A. My best answer as I explained before, just as any other street. I wouldn't say it was a thirty-foot street. I wouldn't say it was a fifty-foot street.

Q. You tell this jury you were standing on the other side of 46th Street, you mean you were standing on the opposite side of the street?

A. I first passed by directly on the sidewalk; then I crossed the street on the other side and I was standing across the street.

Q. And you don't know what distance you were away from this building?

A. Just across the street.

Q. You don't know whether that was thirty feet or fifty feet?

— I wouldn't say how wide the street is. I looked up to the building.

Q. Could you see the inside from the other side of the street?

A. I couldn't look up inside from the other side; I could see part downstairs, but I could see nothing upstairs. This is the affidavit [fol. 15] upon which I secured the search warrant and that is my signature. I read the affidavit before I signed it and knew the contents of it. I swore to the truth of it before the United States Commissioner. I said in this affidavit the building was used for business purposes only.

Q. How can you make the statement or could you make the statement that the building was used for business purposes only if you had never been inside of the building and had never seen the contents of the building?

A. My answer is that a garage and a private dwelling look entirely different. It appears to be a garage and nobody living in it and I was safe in making such affidavit. When I said this building was used for business purposes only I was not really guessing. I had never been inside that building, and it was not a mere guess on my part as to what the building contained.

Q. Do you mean to tell this jury seriously, sitting right there on the witness stand, that you were not guessing as to the contents of that building?

Mr. Siegel: I object to that. I do not think it is fair cross examination on the issue submitted here.

The Court: It is for the purpose of testing the witness' credibility. Overruled.

A. The appearance of the building, and that garage, in my judgment dictated to me that no person in the world lived there.

Q. You knew the obtaining of the search warrant was a serious matter?

A. It was nothing serious where the law was violated.

Mr. Kraushaar: I move to strike out the answer.

The Court: Motion granted.

Q. Did you know whether the obtaining of the search warrant was a serious matter?

A. Not serious where I saw liquor going into the garage.

Mr. Kraushaar: I move to strike out the answer.

The Court: You must either say yes or no, or say I cannot answer that yes or no.

The Witness: It was not serious to me at that time.

Mr. Kraushaar: I move to strike out the answer.

The Court: Yes, you must answer it.

A. It was not serious. Is that the answer?

I have been in the employ of the Government before I obtained this search warrant, close to three years. I am a naturalized citizen [fol. 16] of the United States. Prior to my naturalization I read the Constitution of the United States. I am not an attorney, but as a citizen I knew my rights. I knew one of the most sacred rights of the citizens of the United States is to be protected against search and seizure. I didn't know that the obtaining of the search warrant was a very serious matter when I was right, but if I was wrong, I knew it would be serious. When I said that this place was used for business purposes only I was not guessing. I saw a truck driving into the entrance to the garage. I saw the driver unload from the end of the truck a number of cases stenciled whiskey.

Q. Did you know at the time when you made this affidavit whether the cases which entered that garage were full or not?

A. I didn't examine any of the cases.

Q. You did not know whether the cases that went into that garage contained a single drop of whiskey, did you?

A. They were marked whiskey. I did not know whether they were full or empty.

Q. So you merely had a suspicion at the time that the cases contained whiskey?

A. I had no suspicion at all. I know what the word suspicion means. Suspicion means suspicion. That is the best answer I can make. Everybody understands your question and my answer. I know the difference between knowing what was in those cases and suspicion as to what the contents of the cases were.

Q. Will you please describe to the jury what the difference between those two expressions are?

A. The expression may be—if I went up on the truck and examined, but in this case I didn't open any of those cases.

Q. In other words, if you had opened the cases and examined them, you would have known whether they contained whiskey?

A. I would have known how many bottles would be there at the time, and of course I would have known whether they contained whiskey if I would see. If I would have looked into these cases I would have known what they contained, but I did not look into the cases.

Q. And you were merely guessing as to the contents by the fact that the boxes were labeled whiskey?

A. They were not labeled, they were stenciled and were whiskey cases.

Q. Will you answer my question yes or no?

A. I was not guessing. This is just what I stated in my affidavit, what I say—I didn't say I opened any cases.

Q. Mr. Einstein, you imagined, did you not, because the cases were labeled whiskey, that they contained whiskey?

A. They were not labeled, they were stenciled, regular whiskey cases.

[fol. 17] Mr. Kraushaar: I submit that the answer of the witness is irresponsive, and ask that it be stricken out.

The Court: The witness claims the question is incorrectly framed. He insists they were not labeled, but stencilled.

Witness: When I say the boxes were stencilled whiskey, I believed they contained whiskey. I did not know what they contained. My conclusion that the boxes contained whiskey was based solely on the fact that they were so stencilled.

I left the 46th Street address to go for the search warrant between 9 and 9:30, around that time, a little after nine. I went to the United States Attorney first and the United States Attorney dictated the affidavit to the stenographer. I read it first and signed it, before United States Commissioner Hitchcock.

Q. You didn't go anywhere after leaving the 46th Street address except to go immediately to the United States Attorney's office?

A. When do you mean?

Q. On that morning?

A. I stopped for about five or ten minutes on my way down.

Q. Where?

A. I think in our office 1107 Broadway.

Q. What did you do there?

A. I went in to see the Chief Clerk and he gave me permission to look up old permits.

Q. Where did you look for permits?

A. To look them up, whether a permit exists on that building on 46th Street.

Q. Did you look them up?

A. The clerk looked it up for me.

Q. But you didn't look it up?

A. He showed me all papers and all permittees.

Q. Did you look it up or the Clerk look it up?

A. He had to give me the papers. I couldn't lay my hands on them.

Q. What papers did he give you?

A. He showed me all the books and records he had where permits were held.

Q. What books and records did they have?

A. Everything in their possession.

Q. What were they?

A. I don't know what they were, papers where people held permits.

A. How many employes or clerks were there at that office 1107 Broadway, at that time?

Q. Do you mean agents?

Q. Yes.

A. Probably one hundred or more.

[fol. 18] Q. And do you know how big the files were in that office?

A. We have a special department for files.

Q. Do they keep special books there where the permits are recorded?

A. I don't know how the books are kept. I go there for information.

Q. And you ask the Clerk whether such and such a person had a permit?

A. Not such a person, but the premises. I didn't know at that time whether Steel had a permit or not or owned the place or not. I asked for the premises.

Q. Whom did you ask?

A. I asked the clerk.

Q. So the clerk made the search, you didn't make it?

A. He brought the papers in front of me. I call that making a search. I don't know the name of the clerk, there are so many clerks there. I remember testifying before United States Commissioner Hitchcock in this proceeding on the search warrant.

Q. Do you remember saying anything to the Commissioner about making a search at the prohibition office for a permit?

A. I don't remember whether I did, but I remember I looked over the records.

Q. You knew it was important to find out whether there was a permit at this address?

A. I did.

Q. And you knew that you were not competent to make the search?

A. Where?

Q. At the prohibition office, didn't you?

Mr. Siegel: I object to the materiality of this line of questioning.

Mr. Kraushaar: A question of credibility.

Q. 'A search of the records of the Federal Prohibition Commissioner's office fails to disclose any permit for the manufacture or sale of intoxicating liquors above referred to.'

A. That is true.

Q. Did you make the search personally yourself?

A. I did.

Q. Why didn't you say so in this affidavit?

A. I had to go to the clerk to give me the papers and look them over. I had no right to go and put my hands on them. I had to ask for them.

Q. You didn't make the search, but the search was made by one of the clerks in the office?

A. I had to ask the clerk for it and he showed me the papers and I looked at them.

Q. Why didn't you say in your affidavit here the search was made? [fol. 19] A. It was not necessary. I didn't see whether the wagon left the premises before I went down to make this affidavit for a search warrant. I couldn't say whether the wagon remained there or not. I didn't see the wagon when I came back there. I never saw that wagon again. I couldn't tell who was driving that wagon. I don't know whether the carrier, the man who was driving that wagon, was authorized to carry it. I didn't know whether the goods were being legally or illegally transported at that time. I knew it after that time.

Q. You didn't see these very same cases again that were stencilled whiskey?

A. One case I found on the elevator. That case was, maybe.

Q. You didn't see it in any part of the building called the garage?

A. I recognized one case.

By the Court:

Q. Was this elevator in or out of the garage?

A. This elevator——

Q. Was it part of the garage building?

A. Yes, sir, right in the center of the garage, very large elevator.

By Mr. Kraushaar:

The box I found was an empty box. There were some people living in that building, I believe on the third floor. This fellow Smith told me that he lives there, the fellow that I met first when I entered

the garage. I didn't see a kitchen there, I saw a little room. I don't know whether I would call it a kitchen or not. I did see kitchen utensils there and I did see a table there. I don't recollect whether I saw any plates or spoons. I don't recollect that.

Q. So that at the time you obtained the search warrant there were some people living in this building to all appearances?

A. I wouldn't call it a residence. Smith was stopping there with a certain woman.

Q. Do you know whether it was his wife?

A. He didn't show me his certificate, I don't know.

Q. Didn't he tell you it was his wife?

A. I don't know.

Q. Mr. Einstein, didn't you testify before the Commissioner as follows:

"Didn't you find any beds in the building?

"A. I saw a cot.

"Q. How many cots?

"A. One

"Q. Did you see a kitchen in the building?" and you answered 'no, sir.'

Is that correct?

A. When did I answer this?

Q. Do you remember whether you testified——

A. You didn't ask me now about any cots at all.

[fol. 20] The Court: You are now being asked whether you so testified before the Commissioner.

The Witness: If it is on the record, I so testified.

Q. Can you remember if you so testified, do you remember you were asked the question, "Did you see a kitchen in the building," and you answered "No, sir"—did you so testify?

A. I don't remember if I did or not.

Q. You remember you were asked this question: "Did you go into the room where the cot was," and you answered "I did"?

A. If I so testified, it must be so.

Q. In that room where you saw the cot you also saw the cooking utensils, didn't you?

A. I testified I did.

Q. Do you remember my asking you before the United States Commissioner: "Didn't you see any kitchen utensils there," and you answered, "I didn't pay no attention"?

A. Maybe I did.

Q. Were you telling the truth before the Commission when you said you didn't pay attention?

A. Yes, I did.

Q. Are you telling the truth now when you say you did see cooking utensils there?

A. Well, it came to my memory that I saw a couple of frying pans or table or something else.

Q. Did you see spoons?

A. I don't remember if I did.

Q. Didn't you *testify before the United States Commissioner*, didn't you see any plates or spoons there or anything like that, and you answered, "I was looking for whiskey, I was not looking for spoons"?

A. I so testified.

Q. Before you obtained the search warrant all you knew about this place was that the lower portion of the building was used as a garage; isn't that so, Mr. Einstein?

A. It is not so.

Q. You didn't see any of the upper part of this building before you obtained the search warrant?

A. I testified here before that the whole building was not a private residence, the entire building was used for business purposes.

Q. Mr. Einstein, see if I cannot get you to answer questions correctly; you had never been in this building before you obtained the warrant?

A. No, sir.

Q. All you knew about the building was what you observed by looking through the garage on the ground floor?

A. Standing on the street and observing from the outside. I have already testified that I could not see any part of the interior of the building by looking at it from the outside, except the lower part.

[fol. 21] Q. But the second and third floors, you couldn't see the interior?

A. I couldn't see the interior, but just the appearance from the outside.

I didn't know whether there was any stove or stoves used in connection with the garage at the time I obtained the search warrant. I didn't know whether or not the garage had any store room, container, receptacle, basement or sub-cellar used in connection therewith. I didn't know that it had any room or rooms which were used in connection with the garage other than the garage itself, yet I allowed the Commissioner to issue a search warrant which gave me the right to search, not only the garage, but every other part of that building.

Mr. Kraushaar: I ask that the testimony of this agent, as well as that given by Agent Smith, be suppressed on the ground that there was no proof before the United States Commissioner of reasonable and proper cause for the issuance of the search warrant and upon the further ground that it appears now conclusively by the admissions made by this witness that this affidavit was not based upon reasonable and proper cause, but upon mere conjecture, surmise and suspicion. It appears here now conclusively that he did not know the contents of these cases stencilled whiskey, that it was a mere surmise or suspicion as to what they contained, and a mere guess; that upon the testimony of this witness the Commissioner only had the right to issue a search for the garage itself and had no authority to search any other part of that building; and on the further ground it appears that no part of the liquor was seized in the part which the witnesses saw, but in an entirely different part of the building.

The Court: Motion denied.

Mr. Kraushaar: Exception.

The Witness: The liquor I found was not found in the garage at all, it was only an empty case which I found on the elevator.

Q. Some of it was found on the very floor where this cot and these cooking utensils were?

A. On the same floor, one large space. There is no adjoining rooms; this is one large room.

Q. There was no garage on the first floor, was there?

A. There was an empty space, a loft, I would call it, not a room. I saw some things piled up there, but there was no residence of any kind.

Q. The first floor was used for storage purposes?

A. I don't know what was there.

Q. What floor was the dwelling quarters?

A. On the second floor of the garage we found 92 bags of whiskey. [fol. 22] Q. Is that the floor in which the dwelling quarters were?

A. I never saw any dwelling quarters at all.

Q. Was that the floor on which the cot and cooking utensils were?

A. I saw cots but no dwelling of any kind. That was the floor on which I found some whiskey. I am not able to identify this picture. Maybe I did identify this picture before the United States Commissioner, but I am not able just now to identify it.

Q. Do you mean to tell this Court you cannot identify this as a photograph of the building at the time you made the search?

A. It may be the building but there may be some changes at this time.

Q. Look at this photograph and tell the jury wherein there were any changes in that building?

A. I am not able to identify this just now.

Q. For what reason?

A. No reason; I can't.

Mr. Kraushaar: I move that it be marked for identification.

(Marked Defendant's Exhibit C for identification.)

Q. Was this sign Indian Auto truck service, Indian Head Storage Warehouse on that building at the time you obtained the search warrant?

A. I didn't notice any signs of any kind at that time. I was only looking for the number of the building.

Q. Where did you get the number of the building from?

A. From the building.

Q. Didn't you get it from this Sign Indian Head Autotruck Service, Indian Head Storage Warehouse, 611-609?

A. I don't remember, but I remember getting the number of the building. I don't remember whether this was on it or not.

Q. Do you remember testifying then before the United States Commissioner on this point as follows:—

The Court: Is that presented in order that his credibility may be attacked?

Mr. Kraushaar: Yes, your Honor, and also on the question whether he obtained the search warrant in good faith and whether the search was reasonable and proper.

Q. I ask you to look at this photograph and I show you a photo of curtains on the second floor; did you see these curtains at the time you made your application for the search warrant?

A. I did not.

Q. Didn't notice that?

A. I did not.

Q. Still you say you examined this building very carefully before you went down to make application for a search warrant?

A. I looked it over.

[fol. 23] Q. You gave it the once-over?

A. I was standing there just across the street from the garage.

Q. And yet you won't tell this jury whether this sign was on the building at that time?

A. I don't remember seeing the sign.

Q. But you are positive when you went to make the application for the search warrant, you were positive that this building was used for business purposes only?

A. I didn't see no sign of residence.

Q. So you assumed it was used for business purposes?

A. Yes, sir.

MOE SMITH recalled.

By Mr. Siegel:

Q. Do you remember whether that is the building you visted, Mr. Smith, in December, 1922?

A. It resembles the building with the exception that the day we were there I don't remember anything about these curtains and these two numbers, 609—which was in-cribed on there after we had left there. It seems these were made in there by some chalk marks. That was not there the day we made the seizure—611 and 609.

The Court: Was the sign Indian Head on there?

The Witness: I don't really know. I believe it was there.

By Mr. Kraushaar:

Q. Do you remember testifying before the United States Commissioner as follows, Mr. Smith: The sign Indian Head, Auto-truck Indian Head Storage Warehouse, 609-611 was there at that time, and you answered, "I believe it was"?

A. I still say I believe it was, but I am not positive, but I think since then I was in that locality and I observed that sign on that building.

Q. The building doesn't exist any more, does it?

A. I don't know whether it does.

Mr. Kraushaar: I offer the picture in evidence.

Mr. Siegel: I object to it. Proof of the photograph must be that it is a full and fair representation.

The Court: Objection overruled. Received in evidence, the jury to give such weight to it as is justified by the identification of the two witnesses for the Government.

(Marked Defendant's Exhibit C.)

[fol. 24] Mr. Kraushaar: I will not dispute that what the Government said they found in the premises was intoxicating beverages containing more than one half of one per cent of alcohol by volume.

At the conclusion of the Government's case, the defendant rested and made the following motion to dismiss the information:

MOTION TO DISMISS INFORMATION AND ORDER DENYING SAME

Mr. Kraushaar: Now, if your Honor pleases, I move to dismiss the information. I have not read the information as yet, but I understand it was a simple charge of possession. I move to dismiss the information and ask your Honor to direct a verdict of acquittal on the ground it now conclusively appears that the evidence upon which this information was based was secured upon a search warrant which was void, in violation of the constitutional rights of the defendant, and that the evidence was therefore illegal and improper.

The Court: Motion denied.

Mr. Kraushaar: Exception.

I think it would be a useless effort on the part of my adversary and myself to sum up this case to the jury.

(Summation waived.)

CHARGE TO JURY

Thereupon the Court charged the jury as follows:

The Court: Mr. Foreman and gentlemen of the jury: The issue which you have to determine in this case is exceedingly simple, and you are called upon to do no more than to determine whether you accept the testimony of Agents Einstein and Smith that on the 6th day of December, 1922, they called at the premises known as 611 West 46th Street and there found a large quantity of intoxicating liquor, those premises being used as a garage and for storage purposes, among other purposes and therefore that upon petition of the agents, as the testimony discloses, if accepted, met the defendant Steel and Steel stated that the liquor belonged to him. If you accept this as being true, then, gentlemen, there is no escape from finding that the Government has established its case by a fair pre-

ponderance of evidence, because possession such as is established by testimony in this Court is the kind of possession which the law under which this prosecution is conducted forbids and makes illegal. You are not, gentlemen, to take any cognizance of the fact that the defendant did not testify. In a criminal prosecution a defendant is not required to testify, and a jury may not, under our system of law, draw any unfavorable inference against him by reason of the fact that he does not offer himself as a witness. That circumstance must be eliminated entirely from your consideration, and you have [fol. 25] only to determine whether or not the charge the Government makes against this defendant, namely that on the 6th of December, 1922, he had possession of intoxicating liquor in a manner prohibited by law, has been proved beyond a reasonable doubt.

The Court desires to make it perfectly clear to you that such possession as is indicated by the statute, does not require any actual physical possession of the intoxicating liquor; that one may, under the law and under the well settled decisions by which this Court is bound, have liquor in his possession, if it is in premises forbidden by law, owned or controlled by him under such conditions as the law says is illegal, and this, gentlemen, if you accept the testimony given by the two witnesses for the Government, is such possession as is forbidden by law, and if the testimony is accepted, your verdict must be in accordance with the charge, guilty of the crime charged by the indictment.

COLLOQUY BETWEEN COURT AND COUNSEL

Has the defendant any exceptions to the charge?

Mr. Kraushaar: Exception. I think your Honor did use the statement that the Government must prove the case by a fair preponderance of the evidence. I think that was inadvertent.

The Court: If that was the expression used, it is withdrawn. The Government must prove its case beyond a reasonable doubt. That expression does not mean by an absolute certainty, and beyond all possible doubt, but simply must present to you proof in the acceptance of which the jury finds itself with no uneasiness of mind.

Mr. Kraushaar: I ask your Honor to submit as a question of fact to the jury the following, that it may find that the search made by Isidore Einstein and his associate, Mr. Smith, was unreasonable, they have a right to disregard the entire testimony.

The Court: Have you authority for that request?

Mr. Kraushaar: I haven't on hand, but I think I have a right to make it.

The Court: Request denied. That is not in the case.

Mr. Kraushaar: Exception. I ask your Honor to charge the jury that if they find from the evidence that Einstein had no reasonable or probable cause to believe that the premises on 46th Street contained intoxicating liquor in violation of the National Prohibition Act, and if they believe that the affidavit upon which the search warrant was actually issued was based upon mere surmise or sus-

picion or conjecture, they have a right to disregard his entire testimony [fol. 26] money and that of the Agent Smith.

The Court: Motion denied. That is not in this case at all so far as you gentlemen are to consider it.

Mr. Kraushaar: I except. I also ask your Honor to charge the jury that if the warrant in this case—if they believe the warrant in this case did not particularly describe the place to be searched and the persons or things to be seized, they have a right to disregard the entire testimony of Agents Smith and Einstein who made the search.

The Court: Motion denied.

Mr. Kraushaar: Exception. I ask your Honor to charge the jury as a matter of law, that if they believed that any of the provisions of Articles 4 and 5 of the Constitution of the United States have been violated by this search and seizure, they have a right to disregard the entire testimony of the agents for the Government and acquit the defendant.

The Court: Motion denied.

Mr. Kraushaar: Exception.

The Court: Has the Government any requests?

Mr. Siegel: No requests.

(The jury retired.)

(Upon returning to the courtroom the following proceedings were had:)

VERDICT

The Clerk: Mr. Foreman, and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How say you, sir?

The Foreman: We find the defendant guilty as charged.

The Clerk: Mr. Foreman and gentlemen of the jury, listen to your verdict as it stands recorded, you say you find the defendant guilty as charged and so say you all?

The defendant thereupon moved the Court to set aside the verdict and grant a new trial, as follows:

MOTION TO SET ASIDE VERDICT AND FOR A NEW TRIAL

Mr. Kraushaar: I move to set aside the verdict on the ground it is contrary to law, on the exceptions taken at the trial, and I move for an arrest of judgment upon these grounds, and upon the [fol. 27] further ground it appears from the evidence in the case that the evidence secured by the Government was in violation of the defendant's constitutional rights, in violation of the 4th and 5th amendments to the constitution, in violation of the Espionage Act, and in violation of the National Prohibition Act which restricts the use of search warrants.

The Court overruled the motion, to which ruling the defendant duly excepted, as follows:

The Court: It appears to the Court that the reasonable determination of this matter will be as follows: I desire to allow the defendant an ample opportunity to submit in proper form his conclusions with respect to the legality of the rulings made during this trial. It seems to me it should be unnecessary to bring the defendant here again. I mean by that, I think that these motions can be denied, sentence imposed, the defendant continued on the same bail, if the Government has no objection, and a stay of execution granted and the term extended two or three months to allow you gentlemen to give me your views in briefs in order that this Court may set aside this conviction if this Court has acted illegally.

Mr. Kraushaar: Will your Honor take up the questions that were argued before Judge Winslow?

The Court: I think it is unlikely that I should take up the questions decided by Judge Winslow. These motions are denied. The judgment of the Court is that the defendant pay a fine of \$500; that there be a stay of sentence, of execution of the sentence; that the defendant may take an appeal if he desires, or may apply to a Justice of the Supreme Court for a stay. The term is extended six months and the Court will expect counsel for the defendant within two weeks to submit a brief in connection with the statement by the Court that the Court would reconsider its action in denying these motions in the event it was persuaded its judgment was incorrect.

JUDGMENT

Thereupon the Court entered judgment upon the verdict and sentenced the defendant to pay a fine of Five Hundred Dollars (\$500) to which ruling and judgment of the Court, the defendant by his counsel then and there duly excepted.

Government's Exhibit 1 for identification, bottle of whiskey.

DEFENDANT'S EXHIBIT A

Affidavit for Search Warrant

[fol. 28] SOUTHERN DISTRICT OF NEW YORK, ss:

Isidor Einstein being duly sworn, deposes and says: I am a General Prohibition Agent assigned to duty in the State of New York. On December 6, 1922, at about 10 o'clock A. M. accompanied by Agent Moe W. Smith, I was standing in front of the garage located in the building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York. This building is used for business purposes only. I saw a small truck driven into the entrance of the garage and I saw the driver unload from the end of the truck a number of cases stencilled whiskey. They were the size

and appearance of whiskey cases and I believe that they contained whiskey.

A search of the records of the Federal Prohibition Director's office fails to disclose any permit for the manufacture, sale or possession of intoxicating liquors at the premises above referred to.

The said premises are within the Southern District of New York and upon information and belief, have thereon a quantity of intoxicating liquor containing more than one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, which is used, has been used and is intended for use in violation of the Statute of the United States, to wit, the National Prohibition Act.

This affidavit is made to procure a search warrant, to search said building at the above address, any building or rooms connected or used in connection with said garage, the basement or sub-cellar beneath the same, and to seize all intoxicating liquors found therein.

Isidor Einstein.

Sworn to before me this 6th day of December, 1922. Sam'l
M. Hitchcock, U. S. Commissioner, Southern District of
New York.

Search Warrant

The President of the United States of America to Isidor Einstein,
General Prohibition Agent:

Whereas, it appears from the affidavit of said Isidor Einstein that certain intoxicating liquor containing more than $\frac{1}{2}$ of 1% of alcohol by volume and fit for use for beverage purposes is unlawfully held and possessed in a certain garage located in the four-story building at 611 West 46th Street, Borough of Manhattan, City, and Southern District of New York, said building being used for business [fol. 29] purposes only—and in any safe or desk, store room, container, receptacle, basement or sub-cellar, building, room or rooms connected or used in connection with said garage; and that said liquor is used and is intended for use and has been used in violation of Title II of the National Prohibition Act in that said liquor was and is wilfully, knowingly and unlawfully held in said premises.

Now, therefore, you are hereby commanded in the name of the President of the United States, in the day time only, to enter the said premises, and then and there to search diligently for said liquor, and if the same or any part thereof shall be found on said premises, then you are hereby authorized and commanded to seize and secure the same and to make a return of your doings to the undersigned within ten days from the date hereof.

You are likewise commanded in the event you seize or take said liquor under the warrant to give a copy of this warrant, together with a receipt for the liquor taken, (specifying it in detail) to the person from whom it is taken by you, or in whose possession it is found, or in the absence of any person to leave a copy of this war-

rant, with the receipt as aforesaid, in the place where said liquor is found.

Immediately upon execution of this warrant you are commanded further to forthwith return the warrant to the undersigned, and to deliver to him a written inventory of the liquor taken, duly made and verified by you.

Given under my hand and seal this 6th day of December, 1922.

Sam'l M. Hitchcock, United States Commissioner for the
Southern District of New York.

DEFENDANT'S EXHIBIT B

Inventory

N. Y. C., December 6/22.

Taken from Premises Designated in Search Warrant

150 cases whiskey.
92 Bags whiskey.
1 5 gallon can of alcohol.
6 5 gallon jugs whiskey.
33 cases of gin.
102 quarts whiskey.
2 50 gallon Barrels of whiskey.
1 corking machine.

Isidor Einstein, General Agent.

[fol. 30] Defendant's Exhibit C, photograph.

ORDER SETTLING BILL OF EXCEPTIONS

This is to certify that the foregoing bill of exceptions tendered by the defendant is correct in every particular and is hereby settled and allowed and made a part of the record in this cause.

Done in open Court this 18th day of August, 1924.

Edwin L. Garvin, United States District Judge.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between counsel for the defendant and the United States Attorney that the foregoing bill of exceptions is correct in every particular, and that the same may be settled and allowed and made a part of the record of this

cause, and that an order to this effect may be entered without further notice.

Dated New York, April —, 1924.

(Sgnd.) William Hayward, United States Attorney. Meyer
Kraushaar, Counsel for Defendant.

[fol. 32]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMMITMENT—May 7, 1924

U. S. Criminal Code.—Wilfully and knowingly — unlawfully transport a certain quantity of intoxicating liquor which contained more than one-half of one percent of alcohol by volume and was then and there fit for use for beverage purposes. Act of Oct. 28, 1919.

On motion of the United States Attorney, ordered sentence.

The Court thereupon proceeded to pass judgment, and sentenced the prisoner, John Steel to pay a fine of Five Hundred Dollars and to stand commit-ed until fine be paid or he is otherwise discharged according to law.

Sentence to be executed at the N. Y. City Prison.

Bail continued pending appeal to U. S. Supreme Court.

Defendant remanded to custody of U. S. Marshal to execute sentence.

Edwin L. Garvin, Mar. 31, 1924.

An extract from the Minutes. 4. 1. '24. Fine paid.

Alex. Gilchrist, Jr., Clerk. (Seal Alex. Gilchrist, Jr.)

I hereby certify that, in compliance with the directions contained in the within Commitment, Mar. 31, 1924, I delivered the body of — — to the Warden of —, at —, as herein directed.

Wm. C. Hecht, U. S. Marshal, S. D. N. Y.

Dated New York, — —, —.

[fol. 33]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

This 4th day of April, 1924, comes the defendant by his attorney and files herein and presents to the Court his petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him, praying also that a transcript of the

record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof,

Let a writ of error issue from the Supreme Court of the United States to the United States District Court for the Southern District of New York, prayed for in the petition of the defendant John F. Steele, and that a citation be issued to the defendant-in-error, the United States of America.

Edwin L. Garvin, United States District Judge.

[fol. 34]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR

To Hon. Edwin L. Garvin, Judge of the United States District Court for the Southern District of New York:

Now comes John F. Steele, defendant in the above entitled cause, feeling himself aggrieved by the verdict of the jury in the United States District Court for the Southern District of New York, entered on the 12th day of March, 1924, hereby petitions for an order allowing him, the said defendant, to prosecute a writ of error to the Supreme Court of the United States from the United States District Court for the Southern District of New York.

Assignments of error are filed with this petition.

Meyer Kraushaar, Solicitor and Attorney for Defendant.

[fol. 35]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Now comes John F. Steele, the plaintiff in error in connection with his petition for a writ of error, and says that in the record, proceedings and judgment aforesaid error has intervened to his prejudice, to wit:

1. The Court erred in denying his motion to suppress the evidence given by Moe Smith, and to vacate and set aside a search warrant issued, upon which such evidence was secured, upon the ground that his constitutional rights have been invaded, because the search warrant issued by the Hon. Samuel M. Hitchcock, United States Commissioner, on the 6th day of December, 1922, for the

search of premises 611 West 46th Street, in the Borough of Manhattan, City of New York, Southern District of New York, was issued in violation of the Fourth and Fifth Amendments to the Constitution of the United States, the same not having been issued upon probable cause supported by oath or affirmation particularly describing the place to be searched or the person or thing to be seized.

2. Because the search and seizure conducted under the said search warrant was unreasonable and in violation of the Fourth Amendment to the Constitution of the United States.

3. Because the search warrant was issued in violation of the Fifth Amendment to the Constitution of the United States, on the ground that it deprived the defendant of his property without due process of law.

[fol. 36] 4. On the ground that the defendant was compelled to be a witness against himself, because the said warrant was based upon surmise and suspicion and not upon reasonable and probable cause, in violation of the provisions of the Constitution.

5. On the ground that the affidavit upon which said search warrant was issued, if the same did contain reasonable and probable cause for the issuance thereof, only permitted the search of the garage in the premises 611 West 46th Street, and the warrant was obtained to search the said premises, including any safe, desk, store room, receptacle, basement or a sub-cellar, building, room or rooms used in connection with such garage, and there was no proof either by oath or affirmation of Isidor Einstein or any other person that there was any safe or desk, room, container, receptacle, basement, sub-cellar, building, room or rooms used in connection with such garage, nor was there any proof either by oath or affirmation of reasonable cause to believe that there was any liquor in any safe, desk, storeroom, container, receptacle, basement or sub-cellar, building, room or rooms used in connection with said garage.

6. On the further ground that the search warrant was not issued to a civil officer of the United States, and that the person authorized to make such search and seizure, to wit: Isidor Einstein, was not a civil officer of the United States, authorized to make search and seizure under the statute in such case made and provided.

7. On the further ground that the said affidavit, or the oath or affirmation upon which said search warrant was based, contained no proof that Isidor Einstein was authorized by the Commissioner of Internal Revenue or any other officer of the United States to execute such warrant for search and seizure.

[fol. 37] 8. That the Court erred in refusing to suppress the evidence of said Isidor Einstein and of Moe Smith after they had testified, on the ground that it appeared from such testimony that there was no proof before the United States Commissioner of probable and reasonable cause for the issuance of a search warrant.

9. Upon the ground that it appeared conclusively from the admissions made by said witnesses on the trial that the affidavit upon which said search warrant was issued was not based upon probable cause but on mere conjecture, surmise and suspicion, and it appearing from the said testimony conclusively that they did not know the contents of the cases stencilled "whiskey;" that the said statements were mere surmise and suspicion and a mere guess.

10. On the ground that the Commissioner had a right to issue a search warrant only for the garage itself, and had no authority to issue a warrant for any other building, and that the said seizure was unreasonable because the entire premises were searched and the liquor was found in a building entirely distant from such garage.

11. On the ground that the Court erred in refusing to dismiss the information and direct a verdict of acquittal, because it appeared conclusively that the evidence upon which the information was based was secured upon a search warrant which was void as in violation of the constitutional rights of the defendant, and the evidence, therefore, was illegal and improper.

12. On the ground that the Court erred in refusing to charge the jury as requested by the defendant, as follows: "That it may find that the search made by Isidor Einstein and his associate, Mr. Smith, was unreasonable, they have a right to disregard the entire [fol. 38] testimony." Also, "That if they find from the evidence that Einstein had no reasonable or probable cause to believe that the premises on 46th Street contained intoxicating liquor in violation of the National Prohibition Act, and if they believe that the affidavit upon which the search warrant was actually issued was based upon mere surmise or suspicion or conjecture, they have a right to disregard his entire testimony and that of the Agent Smith." Further, that "If they believe the warrant in this case did not particularly describe the place to be searched and the persons or things to be seized, they have a right to disregard the entire testimony of Agents Smith and Einstein, who made the search." And, lastly, "That if they believe that any of the provisions of Articles 4 and 5 of the Constitution of the United States have been violated by this search and seizure, they have a right to disregard the entire testimony of the agents for the Government and acquit the defendant."

13. That the Court erred in making the following ruling:

"Mr. Kraushaar: I ask your Honor at this stage to examine the witness for the purpose of showing that the witness had no evidence of any kind against these premises until the search warrant was obtained.

The Court: Motion denied.

Mr. Kraushaar: Exception."

14. That the Court erred in overruling and denying the motion of the defendant in arrest of judgment.

15. That the Court erred in entering a judgment against the defendant on the verdict in this case.

16. That the judgment of the Court is contrary to law.

Wherefore the plaintiff in error prays that the judgment of the District Court of the United States for the Southern District of New York may be reversed and held at naught, etc.

Meyer Kraushaar, Solicitor and Attorney for Petitioner.

[fol. 39] CITATION—In usual form on Wm. Hayward; filed April 8, 1924; omitted in printing

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AND ORDER EXTENDING TIME

It is hereby stipulated and agreed by and between the United States Attorney and the attorney for the plaintiff in error, that the time of the plaintiff in error to file a transcript of the record herein, in the Office of the Clerk of the Supreme Court of the United States be and the same is hereby extended to and including the 15th day of September, 1924, and that an order to that effect may be entered without further notice, nunc pro tunc as of the 8th day of April, 1924.

Dated New York, August 25th, 1924.

William Hayward, United States Attorney. Meyer Kraushaar, Attorney for Plaintiff in Error.

So ordered. Edwin L. Garvin, United States District Judge.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated August 27th, 1924.

Meyer Kraushaar, Attorney for Defendant. William Hayward, Attorney for Complainant.

[fol. 42]

IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 27th day of August, in the year of our Lord one thousand nine hundred and twenty four, and of the Independence of the said United States the one hundred and forty-ninth.

Alex. Gilchrist, Jr., Clerk. (Seal of the District Court of the United States, Southern District of New York.)

Endorsed on cover: File No. 30,601. S. New York D. C. U. S. Term No. 636. John F. Steele, plaintiff in error, vs. The United States of America. Filed September 5, 1924. File No. 30,601.

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